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WHAT WE KNOW AND NEED TO KNOW ABOUT CIVIL GIDEON

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I. ACCESS TO JUSTICE AND CIVIL GIDEON

The legal profession has undertaken a renewed effort to improve access to justice for low- and moderate-income unrepresented civil litigants.¹ The question of whether and how to provide assistance to individuals who cannot afford counsel is a pressing nationwide issue.² Studies confirm that at most 20% of the legal needs of low-income communities are met and that the vast majority of low-income civil litigants are unrepresented,³ creating what some call a “justice gap,” which has become even more urgent in recent years.⁴ The recent recession hit indigent people hard, multiplying the civil problems they tend to face, such as home foreclosures, evictions, social security disputes, and nonpayment of child support.⁵ State tribunals that deal with high-stakes issues particularly relevant to low-income residents, such as family courts and housing courts, are seeing an increasing number of litigants, the majority of whom are unrepresented.⁶ Many of these pro se litigants live either below or within 125%

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1. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 1 (2009).

2. *Id.* at 2.

3. *Id.* at 13.

4. *Id.* at 5.

5. See Emily Savner, *Expand Legal Services Now*, NAT’L L.J. (June 28, 2010), <http://www.nationallawjournal.com/id=1202463009686>.

6. See LEGAL SERVS. CORP., *supra* note 1, at 25–26 (citing NAT’L CTR. FOR STATE COURTS, SELF-REPRESENTED PRO SE STATISTICS MEMORANDUM, Sept. 25, 2006, <http://www.ncsconline.org/wc/publications/memos/prosestatmemo.htm#other>).

of the poverty line, qualifying them for legal aid.⁷ Few, however, are actually able to access this aid.⁸ Recession-era cutbacks have left legal aid organizations with dwindling resources to meet a growing demand.⁹ Nationwide, for every 6,415 people who meet legal aid requirements, there is only one legal aid attorney available to meet their needs.¹⁰

To address the urgent and unmet legal needs of low-income Americans, the legal community is pursuing increased access to justice at the national, state, and local levels.¹¹ For example, the Department of Justice launched an Access to Justice Initiative in 2010 and thirty-two states have “Access to Justice Commissions” tasked with the goal of ensuring that all litigants have a fair opportunity to be heard in civil court.¹²

The “Civil Gideon” movement aims to address the justice gap by advocating for an expanded right to counsel for pro se low-income civil litigants in cases implicating basic human needs.¹³ This movement asserts that systemic representation by counsel improves the accuracy of outcomes, increases court efficiency by reducing the effect of waves of pro se litigants on court staff, saves federal and state government money by helping to avoid the negative externalities caused by litigants wrongly losing their civil cases (such as increased use of shelters, emergency medical care, foster care, police, and public benefits), and increases the public’s faith and investment in the judicial process.¹⁴

The Self-Representation movement, by contrast, takes the position that political and economic constraints make it very unlikely that all those eligible can be afforded free counsel.¹⁵ It also questions the necessity of free counsel in every such case, pointing out that some legal matters may be more simplified,

7. *Id.* at 27 (citing Income Level for Individuals Eligible for Assistance, 74 Fed. Reg. 19, 5620 (Jan. 30, 2009) (to be codified at 45 C.F.R. pt. 1611)).

8. *See id.* at 27–28.

9. *See id.*

10. *Id.* at 27.

11. *See id.* at 27–28.

12. RES. CTR. FOR ACCESS TO JUSTICE INITIATIVES, STATE ACCESS TO JUSTICE COMMISSIONS: CREATION, COMPOSITION, AND FURTHER DETAILS (Am. Bar Ass’n Sept. 2014), http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html.

13. *See* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 38 (2010). The terms “Civil Gideon” and “civil right to counsel” are commonly used interchangeably (as they are in this Paper). However, the advocates for a civil right to counsel seek appointment of counsel in cases involving basic human needs rather than all cases involving unrepresented civil litigants.

14. *About the Civil Right to Counsel*, NAT’L COAL. FOR A CIVIL RIGHT TO COUNSEL (NCCRC) (2013), <http://civilrighttocounsel.org/about>.

15. Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 46 (2012), <http://yalelawjournal.org/2012/07/30/selbin-charn-alfieri&wizner.html> (citing D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2121, 2124 (2012)).

there may be other forms of assistance (e.g., litigant-friendly procedures and judicial case management) that will suffice to facilitate access to courts, and that self-representation may be empowering to low-income litigants.¹⁶ Indeed, there are a plethora of assistance programs that range from providing limited forms of intervention—like informative websites, hotlines, layperson-friendly legal forms, and self-help centers—to full intervention, providing representation for indigent persons.¹⁷

While advocates for Civil Gideon do not claim that an attorney is essential in every case involving an unrepresented litigant, they place greater emphasis on securing a right to civil counsel than on increased resources and innovation for self-representation.¹⁸ Notwithstanding the increased attention and efforts directed at the broader access to justice agenda in the United States, there is still a great deal that we do not know about Civil Gideon. This Paper examines what we know and need to know about Civil Gideon. On the “what we know” front, the Paper examines Supreme Court jurisprudence addressing claims for a constitutional due process right to counsel in civil cases, existing state laws providing a right to counsel in civil cases, and current efforts and state legislation to expand the civil right to counsel.¹⁹ Addressing “what we need to know,” the Paper examines empirical research on the efficacy of legal representation in civil cases, the take up rate for appointed counsel in Civil Gideon jurisdictions, the costs of Civil Gideon both to the public and to civil litigants who utilize appointed counsel, and the administration of Civil Gideon.²⁰

II. SUPREME COURT JURISPRUDENCE ADDRESSING THE CONSTITUTIONAL RIGHT TO COUNSEL IN CIVIL CASES

In the landmark *Gideon v. Wainwright* case, the Supreme Court found that due process requires that counsel must be provided to indigent defendants in all felony cases.²¹ The Civil Gideon movement advocates a similar expansion of the right to counsel for pro se, low-income litigants in civil cases involving basic human needs.²² Proponents of Civil Gideon argue that counsel is necessary in providing meaningful access to the courts.²³ Keillnor and his coauthors summarize, “In criminal cases, the Sixth Amendment right to counsel ‘is predicated on the view that the function of counsel is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to

16. Richard Zorza, *The Relationship of the Right to Counsel and Self-Represented Litigant Movements*, 2012 MGMT. INFO. EXCHANGE J. 47, 48 (2012).

17. *Id.*

18. *See id.* at 47–48.

19. *See infra* text accompanying notes 21–56.

20. *See infra* text accompanying notes 145–173.

21. *Gideon v. Wainwright*, 372 U.S. 335, 345–46 (1963) (quoting *Powell v. Alabama*, 287 U.S. 56, 68–69 (1932)).

22. *See Engler, supra* note 13, at 38.

23. *See id.* at 39.

make, not to make choices for him.’ The same rationale calls for a right to counsel in civil actions.”²⁴ Civil cases can be as consequential, complex, and adversarial as criminal cases, implicating basic human needs such as housing, safety, health, and child custody.²⁵

Supreme Court jurisprudence addressing a civil right to counsel, however, has not fully endorsed this view.²⁶ The Supreme Court first took up the issue in *In re Gault*,²⁷ finding that juveniles in delinquency proceedings have a constitutional right to civil counsel under the Due Process Clause.²⁸ The decision in the case recognized the liberty interest at stake in delinquency proceedings.²⁹ Also significant was the fact that, at the time *In re Gault* was decided, fully one-third of states provided juveniles with counsel in such cases.³⁰ In finding a civil right to counsel under the federal constitution,³¹ the 1967 *In re Gault* decision continues to represent the high point in Supreme Court jurisprudence on this issue.

Since *In re Gault*, the Supreme Court has taken relatively few cases involving claims for a civil right to counsel and the outcomes of those cases do not offer much hope to Civil Gideon advocates.³² In *Vitek v. Jones*,³³ prisoners brought a due process challenge to their involuntary transfer to a mental health facility.³⁴ Although the Court recognized that the prisoners (though confined in state custody) have a liberty interest at stake in the involuntary transfers, its ruling did not recognize a civil right to counsel in this circumstance.³⁵ More specifically, the Court held that the prisoners facing involuntary transfer to a mental health facility were constitutionally entitled to “competent help” which consists of a “qualified and independent advisor.”³⁶ Thus, the decision held that due process required a more limited form of assistance than full attorney representation.³⁷

24. Stan Keillnor et al., *The Inevitable, if Untrumpeted, March Toward “Civil Gideon,”* 64 SYRACUSE L. REV. 469, 472 (2014) (quoting *Jones v. Barnes*, 463 U.S. 745, 759 (1983)) (citing Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057, 1101 (2010)).

25. Chad Flanders & Alexander Muntges, *The Trumpet Player’s Lament: Rethinking the Civil Gideon Movement*, 17 UDC/DCSL L. REV. 28, 29, 31 (2014).

26. See Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 529–30 (2006) (citations omitted).

27. See, e.g., *In re Gault*, 387 U.S. 1, 42 (1967) (supporting a juvenile’s right to counsel).

28. *Id.* at 41.

29. *Id.* at 36.

30. *Id.* at 37–38.

31. *Id.* at 41–42.

32. See, e.g., *Turner v. Rogers*, 131 S. Ct. 2507 (2011); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 34 (1981); *Vitek v. Jones*, 445 U.S. 480, 497 (1980).

33. 445 U.S. 480.

34. *Id.* at 484.

35. *Id.* at 494, 497.

36. *Id.* at 499 (Powell, J., concurring).

37. *Id.* at 497.

In subsequent Civil Gideon cases, *Lassiter v. Department of Social Services* (decided in 1981) and in the 2011 case, *Turner v. Rogers*, the Supreme Court again failed to find a categorical due process right to counsel in civil cases.³⁸ *Lassiter* involved a constitutional claim for court appointed counsel for an indigent litigant in a case brought by the state to terminate parental rights.³⁹ At that time, thirty-three states already provided individuals with appointed counsel in termination of parental rights suits brought by the state.⁴⁰ In considering *Lassiter*'s claim, the Court applied the balancing test outlined in *Mathews v. Eldridge*.⁴¹ In this case, the Supreme Court held that determinations of due process require consideration of three factors: "1) the private interests that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards, and 3) the Government's interest."⁴² The *Mathews v. Eldridge* balancing test suggests that a due process right to counsel should be determined on a case-by-case basis in light of these considerations.⁴³

The Court held in *Lassiter* that there was no absolute right to counsel in TPR cases and, instead, appointment of counsel must be determined on a case-by-case basis, even though its three-factor analysis weighed in favor of appointment of counsel.⁴⁴ Specifically, the Court found that the personal interest at stake is "extremely important," that the state's interest is "relatively weak," and that TPR proceedings are complex and might "overwhelm an uncounseled parent."⁴⁵ In *Lassiter*, the Court further created a presumption that "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."⁴⁶ Consequently, Civil Gideon claims may fail even when there is a strong showing on all three of the *Mathews v. Eldridge* factors because they must also overcome a presumption against appointed counsel where there is no risk of loss of physical liberty.

In *Turner v. Rogers*,⁴⁷ the Court addressed the question of whether the Due Process Clause requires states to provide legal counsel to an indigent non-custodial parent at a child support contempt hearing that could lead to civil incarceration.⁴⁸ The petitioner, Michael Turner, had spent a year in jail for failure to pay court-ordered child support.⁴⁹ In *Turner*, the Court held that

38. *Turner v. Rogers*, 131 S. Ct. 2507, 2512 (2011); *Lassiter v. Dep't. of Soc. Servs.* 452 U.S. 18, 27 (1981).

39. *Lassiter*, 452 U.S. at 24.

40. *Id.* at 34.

41. *Id.* at 27 (citing *Mathews v. Eldridge* 424 U.S. 319, 335 (1976)).

42. *Mathews*, 424 U.S. at 321.

43. Keillnor, *supra* note 24, at 474.

44. *Lassiter*, 452 U.S. at 26–27.

45. *Id.* at 30–31.

46. *Id.* at 26–27.

47. *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

48. *Id.* at 2512.

49. *Id.* at 2515.

although the procedures used in South Carolina did not satisfy constitutional guarantees, the Due Process Clause does not require appointed counsel in nonsupport civil contempt proceedings where the opponent is an unrepresented private party and the matter is not complex.⁵⁰ While *Lassiter* suggested a right to counsel when physical liberty is at stake,⁵¹ in *Turner* the Court found that counsel is not categorically required even in these situations.⁵²

Instead, the Court held that states must, at a minimum, provide unrepresented litigants with “substitute procedural safeguards” to ensure that the litigants have meaningful access to the courts.⁵³ These “substitute procedural safeguards”—which included: a formal notice informing the defendant that ability to pay was the central issue in the case; a form seeking information about the defendant’s ability to pay the child support owed; a hearing at which the defendant would be questioned about information provided on the form; and a judicial finding on whether the defendant had the ability to pay the court-ordered support—would, in the Court’s view, significantly reduce the risk of an erroneous civil incarceration.⁵⁴ Importantly, the record lacked evidence bearing on the utility of the assistance that made up the substitute procedural safeguards.⁵⁵ Indeed, in endorsing these modes of legal assistance, the *Turner* Court adopted the suggestion of the Solicitor General, a nonparty to the case who opposed recognition of a right to counsel in the case.⁵⁶ Questions left unanswered in the *Turner* case include whether appointment of counsel would be constitutionally required in civil contempt proceedings where either the issues in the case are unusually complex or there is an imbalance in representation (i.e., an unrepresented litigant is facing either the state or an opposing party who is represented by counsel).

III. EXISTING STATE LAW PROVIDING A RIGHT TO COUNSEL IN CIVIL CASES

Indigent civil litigants in most states have long enjoyed a right to counsel in certain categories of suits.⁵⁷ The right to counsel in these instances results both from state legislation and court decisions in cases brought under state and federal constitutions.⁵⁸ Laura K. Abel and Max Rettig summarize and outline the

50. *Id.* at 2520.

51. *Lassiter*, 452 U.S. at 27.

52. *Turner*, 131 S. Ct. at 2520.

53. *Id.* at 2518 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

54. *Id.* at 2519.

55. *Id.* at 2519–20.

56. *Id.* at 2520.

57. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 245, 245 (2006); John Pollack, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 DRAKE L.J. 763 (2013), http://civilrighttocounsel.org/uploaded_files/4/The_Case_Against_Case-by-Case_Pollock_.pdf.

58. Abel & Rettig, *supra* note 57.

various state laws providing a right to counsel in civil cases.⁵⁹ These statutes and court decisions generally specify a right to counsel in relation to certain family law matters, involuntary commitment, and medical treatment.⁶⁰ Regarding family law, most states have provisions for the appointment of an attorney or a guardian ad litem for children in abuse and neglect cases.⁶¹ Nearly all states also guarantee representation for parents involved in abuse/neglect, and state-initiated termination of parental rights cases.⁶² Some states have statutory provisions outlining a right to counsel in other family law matters, including domestic violence proceedings, paternity proceedings, and child custody, support, and visitation proceeding.⁶³ Many states also guarantee counsel for people facing involuntary commitment or quarantine and for those who are the subject of a petition for involuntary protective services or guardianship.⁶⁴ Finally, some state statutes outline a right to counsel in relation to certain efforts to gain access to medical treatment (e.g. for minors seeking a judicial bypass of parental consent for abortion) or be free from medical treatment (e.g. involuntary sterilization).⁶⁵

While most civil right to counsel laws fall within the above categories, states have also developed mandatory right-to-counsel statutes in relation to matters pertaining to civil arrest or imprisonment, individual under disability to sue, petition for special immigrant juvenile status, release of mental health records, and military members.⁶⁶ States have also established statutes providing for the discretionary appointment of counsel in certain kinds of cases, including civil rights cases, housing discrimination cases, and school attendance cases, while some states permit counsel to be appointed in any civil case.⁶⁷

In 2014, the ABA, in collaboration with the National Coalition for a Civil Right to Counsel, released the “Directory of Law Governing Appointment of Counsel in State Civil Proceedings.”⁶⁸ This comprehensive resource provides state-by-state information on laws regarding the judicial appointment of counsel for indigent clients in civil cases.⁶⁹ The directory covers laws deriving from state and federal statutes, state court rules, and state court decisions.⁷⁰ The National Coalition for a Civil Right to Counsel has also developed a status map

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 246.

63. *Id.*

64. *Id.* at 246–47.

65. *Id.* at 247.

66. *Id.*

67. *Id.*

68. *Directory of Law Governing Appointment of Counsel in State Civil Proceedings*, A.B.A. (2014), http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/resources---information-on-key-atj-issues/civil_right_to_counsel1.html.

69. *Id.*

70. *Id.*

that outlines state right to counsel laws; this information is regularly kept current.⁷¹ Appendix I lists the number of states that have established right to counsel laws in relation to various types of proceedings.⁷² A majority of states have developed categorical right to counsel laws in relation to state-initiated termination of parental rights proceedings, child abuse, neglect, or dependency proceedings, guardianship, and involuntary commitment proceedings.⁷³

IV. CURRENT NATIONAL EFFORTS TO EXPAND THE CIVIL RIGHT TO COUNSEL

National entities including the Department of Justice and the White House have both acknowledged the pressing issue of access to justice.⁷⁴ In 2010, the Department of Justice started the Access to Justice Initiative, which aims to “help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status” through collaborative efforts with federal, state, local, and tribal justice system stakeholders.⁷⁵ In 2013, the White House co-hosted a forum with the Legal Services Corporation on increasing access to justice.⁷⁶ This event highlighted the national and state-level efforts and included panels on pro bono legal service delivery.⁷⁷

Related to efforts to increase access to justice, the ABA and other entities have endorsed a broader civil right to counsel.⁷⁸ In 2006, the American Bar Association approved Resolution 112A, which “urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as determined by each jurisdiction.”⁷⁹ The Resolution was co-sponsored by thirteen state and local bar associations and its principles were subsequently endorsed by a number of other state bars.⁸⁰ In August of 2010, the ABA additionally set forth a Model Access Act and Basic Principles of a Right to Counsel in Civil Legal Proceedings in revised resolutions 104 and 105, respectively.⁸¹ Resolution 104 creates a Model

71. *Status Map*, NCCRC (2013), <http://civilrighttocounsel.org/map>.

72. *See id.*

73. *See id.*

74. LEGAL SERVS. CORP., WHITE HOUSE FORUM ON INCREASING ACCESS TO JUSTICE (2013), <http://www.lsc.gov/photo-gallery-white-house-forum-increasing-access-justice>; U.S. DEP'T OF JUSTICE, ACCESS TO JUSTICE INITIATIVE (2015), <http://www.justice.gov/atj>.

75. LEGAL SERVS. CORP., *supra* note 74.

76. *Id.*

77. *Id.*

78. *See, e.g.*, Howard H. Dana, *Report to the House of Delegates*, 2006 A.B.A. H.D. REP. 112A.

79. *Id.*

80. *General Civil Right to Counsel Model Acts and Resolutions*, NCCRC (2013), <http://civilrighttocounsel.org/bibliography/sections/12>.

81. Lorna G. Schofield, *Report to the House of Delegates*, 2006 A.B.A. H.D. REP. 104; Robert E. Stein, *ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings*, 2010

Act for the implementation of the civil right to counsel in basic needs cases.⁸² The Act defines the scope of the right to public legal services in these cases, and established a State Access Board and a State Access Fund to specify the funding mechanisms and administrative body of the program.⁸³ In Resolution 105, the ABA outlines 10 principles of a right to counsel in civil proceedings where basic human needs are at stake.⁸⁴ These principles aim to ensure effective representation and define standards relating to determining eligibility of clients, the timely appointment of counsel, and the professional responsibility and adequate compensation of attorneys.⁸⁵ Through both the Model Act and the Principles resolutions, the ABA aims to encourage and guide jurisdictions in their efforts to expand access to counsel in civil matters involving basic human needs.⁸⁶

Other entities have also called for a right to counsel in certain classes of civil cases generally relating to basic human needs and immigration.⁸⁷ For instance, in 2014, the U.N. Human Rights Committee released a series of recommendations to enhance U.S. compliance with the International Covenant on Civil and Political Rights.⁸⁸ These recommendations included the provision of legal representation for certain categories of immigrants facing mandatory detention and deportation and for women victims of domestic violence.⁸⁹ The “Vulnerable Immigrant Voice Act,” a federal bill introduced in 2014, requires the provision of counsel in removal or related proceedings for immigrants who are unaccompanied minors or who are unable to self-represent due to a mental disability.⁹⁰

In addition to these national efforts, thirty-two states have access to justice commissions that aim to ensure that “all litigants have an opportunity to be heard

A.B.A. H.D. REP. 105 1-12; Letter from Lorna G. Schofield, Section of Litigation, to A.B.A. (2006); Robert E. Stein, Standing Committee on Legal Aid and Indigent Defendants (Aug. 2010).

82. Schofield, *supra* note 81, at 1.

83. *Id.* at 8.

84. Stein, *supra* note 81, at 1.

85. *Id.* at 4–12.

86. See Schofield, *supra* note 81; see also Stein, *supra* note 81, at 1.

87. See, e.g., Human Rights Council, Special Rapporteur on the Independence of Judges and Lawyers, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, ¶ 20, U.N. Doc. A/HRC/23/43 (Mar. 15, 2013) (“[Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. Access to legal advice and assistance is also an important safeguard that helps to ensure fairness and public trust in the administration of justice”]; Human Rights Comm., *Concluding Observations—United States of America*, ¶ 16, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) (expressing concern regarding deportation and mandatory detention of certain categories of immigrants, and recommending that U.S. “take measures to ensure that affected persons have access to legal representation.”).

88. *Id.* at 2–11.

89. *Id.* at 7–8.

90. Vulnerable Immigrant Voice Act, H.R. 4936, 113th Cong. § 2(c)(1)–(2) (2d Sess. 2014).

in civil court.”⁹¹ A number of states also have bar associations that, in addition to endorsing the ABA resolution, have created subcommittees devoted to studying civil right to counsel.⁹² While the work of these commissions can focus on enhancing litigants’ ability to self-represent, many also strive to increase access to representation in civil cases through the development of pro bono programs or the support of research demonstrating the impact of counsel.⁹³

V. RECENT CIVIL COUNSEL INITIATIVES

A. State and Local Initiatives

Efforts to increase the right to counsel in civil cases have continued at the state and local level.⁹⁴ Twenty-three states have expanded the right to counsel through state statutes, local ordinances, and court decisions within the past few years.⁹⁵ Many of the statutory laws and court decisions are consistent with the existing laws outlining a right to counsel in civil cases; they largely fall under the categories of family law, involuntary commitment, and medical treatment.⁹⁶ New court decisions and statutes further specify the right to counsel in certain civil proceedings or for certain classes of individuals.⁹⁷

A number of recent court decisions and legislative actions have addressed the right to civil counsel in family law matters.⁹⁸ Many have extended the right

91. See Res. Ctr. for Access to Just., *supra* note 12.

92. See John Pollock, *Where We’ve Been, Where We’re Going: A Look at the Status of the Civil Right to Counsel, and Current Efforts*, 26 MIE J. 29, 31 (2012).

93. See *id.*

94. *Status Map*, *supra* note 71.

95. *Id.*

96. See, e.g., COLO. REV. STAT. § 27-65-107(5) (2015) (The court “shall forthwith appoint an attorney to represent a respondent” under court order for evaluation.); NEB. REV. STAT. § 71-945 (2002) (“A subject shall have the right to be represented by counsel in all proceedings under the Nebraska Mental Health Commitment Act or the Sex Offender Commitment Act.”); *Salas v. Cortez*, 593 P.2d 226, 234 (CAL. 1979) (“Accordingly, this court holds that in proceedings to determine paternity in which the state appears as a party or appears on behalf of a mother or child, indigent defendants are constitutionally entitled to appointed counsel.”).

97. See, e.g., MO. REV. STAT. § 453.030(11) (2013) (“A birth parent, including a birth parent less than eighteen years of age, shall have the right to legal representation and payment of any reasonable legal fees incurred throughout the adoption process.”); *Rapoport v. G.M.*, 657 N.Y.S.2d 748, 748–49 (App. Div. 1997) (“In a proceeding . . . to involuntarily hospitalize a person there exists a constitutional right to counsel.”).

98. See, e.g., UTAH CODE ANN. § 78A-6-1111(1)(c) (West 1953) (“[I]n any action initiated by the state or a political subdivision of the state under Part 3, Abuse, Neglect, and Dependency Proceedings; Part 5, Termination of Parental Rights Act; or Part 10, Adult Offenses, of this chapter or under Section 78A-6-1101, a parent or legal guardian requests an attorney and is found by the court to be indigent, counsel shall be appointed by the court to represent the parent or legal guardian in all proceedings directly related to the petition or motion filed by the state . . .”); *State v. Creamer*, 528 So. 2d 667, 669 (La. Ct. App. 1988) (holding that there is a right to counsel in a case involving a civil petition for child support); *Carroll v. Moore*, 423 N.W.2d 757, 767 (Neb. 1988)

to counsel in termination of parental rights proceedings.⁹⁹ For instance, while Montana had a statutory guarantee of counsel for parents in state-brought termination of parental rights proceedings, the Supreme Court of Montana recently held that such rights extend to parents in proceedings brought by a private party.¹⁰⁰ Colorado similarly has a statutory right to counsel in state-initiated termination of parental rights proceedings, but no statutory right for nonconsenting parents in a privately-initiated relinquishment proceeding.¹⁰¹ In a case decided in 2014, the Colorado Court of Appeals found a right to counsel on the grounds that such proceedings implicate complex legal issues and parents have insufficient procedural protections.¹⁰² A recent decision by the Iowa Supreme Court has also established a right to appointed counsel in private termination proceedings.¹⁰³ Tennessee and South Carolina have extended the right to counsel in termination of parental rights hearings to include adoption and private cases respectively.¹⁰⁴

Other recent activity has established guaranteed counsel for children in a variety of cases.¹⁰⁵ An Ohio Court of Appeals held that minor defendants are categorically entitled to counsel in civil protective order proceedings.¹⁰⁶ Georgia passed two laws in 2013, one outlining the right to counsel for children in dependency proceedings and another specifying a right to counsel in deprivation cases.¹⁰⁷ Florida passed a law in 2014 that requires the appointment of counsel for children with developmental disabilities, victims of human trafficking, and those residing in nursing facilities in dependency and termination of parental rights cases.¹⁰⁸ This law expanded the existing law in Florida, which outlined the discretionary appointment of counsel.¹⁰⁹

(“We conclude that due process requires that an indigent defendant has an absolute right to court-appointed counsel in state-initiated paternity proceedings.”).

99. See, e.g., ARIZ. REV. STAT. ANN. § 8-221(B) (2010) (“If a juvenile, parent or guardian is found to be indigent and entitled to counsel, the juvenile court shall appoint an attorney to represent the person or persons . . .”); GA. CODE ANN. § 15-11-262(j) (2015) (“The court shall appoint an attorney for a child in a termination of parental rights proceeding.”); *In re T.M.*, 319 P.3d 338, 340 (Hawaii 2014) (“Parents have a constitutional right to counsel under article I, section 5 in parental termination proceedings.”).

100. J.N.S. (*In re Adoption of A.W.S & K.R.S.*) v. A.W. 339 P.3d 414, 419 (Mont. 2014).

101. See COLO. REV. STAT. § 19-3-602(2) (2015) (providing right to appointment of counsel for indigent parents in termination of parental rights proceedings brought by state).

102. *In Re R.A.M.*, No. 13CA0940, 2014 WL 2148793, at 7 (Colo. App. May 22, 2014).

103. *Crowell v. State Pub. Def.*, 845 N.W.2d 676, 691 (Iowa 2014).

104. TENN. CODE ANN. § 37-1-126 (2014); *Broom v. Jennifer*, 403 S.C. 96, 108, 742 S.E.2d 382, 388 (S.C. 2013).

105. See, e.g., FLA. STAT. § 39.01305 (2014); GA. CODE ANN. § 15-11-103 (2013); *In re D.L.* 937 N.E.2d 1042, 1047 (Ohio Ct. App. 2010).

106. *In re D.L.*, 937 N.E.2d at 1047.

107. GA. CODE ANN. § 15-11-103 (2015); H.B. 242, 2013 Gen. Assemb., Reg. Sess. (Ga. 2013).

108. FLA. STAT. § 39.01305 (2014).

109. FLA. R. JUV. P. § 8.217.

The right to counsel in family law matters has also been clarified in relation to legal proceedings beyond the trial.¹¹⁰ In 2010, the Indiana Supreme Court held that the right to counsel in termination of parental rights proceedings extends to the appeal process.¹¹¹ The Michigan Supreme Court clarified that the right to counsel for parents in child protective proceedings includes the preliminary hearing.¹¹² The Ohio Supreme court held that the right to counsel in guardianship establishment proceedings extended to review proceedings as well.¹¹³

States continue to define and extend the right to counsel in matters of involuntary commitment and medical treatment as well.¹¹⁴ For instance, the Kansas Supreme Court found a due process right to counsel in sexually violent predator commitment proceedings.¹¹⁵ Illinois introduced a state law that went into effect in 2010 that established a right to counsel for wards of the state in proceedings where the ward objects to state-sought sterilization.¹¹⁶

Recent activities have also specified a right to counsel in other matters.¹¹⁷ In Indiana, the Court of Appeals ruled that the trial court in the case *KOA Properties LLC v. Matheison* did not err in appointing counsel in relation to a small claims matter.¹¹⁸ The court held that judges maintain a discretionary ability to appoint counsel “to ensure pro se litigants the opportunity to have their matters fairly heard,” even in the absence of a direct request for counsel from the plaintiff.¹¹⁹ A bill introduced in the New York State Senate outlines a broad right to counsel in many kinds of cases, including child support, housing, and health.¹²⁰ In addition, a New York City Council bill introduced in 2014 outlined the provision of legal counsel for low-income tenants facing eviction or foreclosure proceedings.¹²¹

B. Pilot Programs and Evaluations

California’s Sargent Shriver Civil Counsel Act¹²² is one of the most large-scale and well-known state access to justice initiatives.¹²³ The Act provides

110. See, e.g., MICH. CT. R. 3.915(B)(1); *In re I.B.*, 933 N.E.2d 1264, 1271 (Ind. 2010); *State ex rel. McQueen v. Cuyahoga Cnty.*, 986 N.E.2d 925, 930 (Ohio 2013).

111. *In re I.B.*, 933 N.E.2d at 1271.

112. MICH. CT. R. 3.915(B)(1).

113. *McQueen*, 986 N.E.2d at 930.

114. See, e.g., 755 ILL. COMP. STAT. ANN. 5/11a-17.1 (2010); *In re Ontiberos*, 287 P.3d 855, 864–65 (Kan. 2012).

115. *In re Ontiberos*, 287 P.3d at 864–65.

116. 755 ILL. COMP. STAT. ANN. 5/11a-17.1.

117. See, e.g., *KOA Props., LLC v. Matheison*, 984 N.E.2d 1255 (Ind. Ct. App. 2013); S.B. 5993, 2013 Gen. Assemb., Reg. Sess. (N.Y. 2013).

118. *KOA Props.*, 984 N.E.2d at 1257.

119. *Id.*

120. S.B. 5993, 2013 Gen. Assemb., Reg. Sess. (N.Y. 2013).

121. N.Y., N.Y., Int. 214-A (2014).

122. Sargent Shriver Civil Counsel Act, CAL. GOV’T CODE § 68650 (West 2010).

funding for seven pilot projects aiming to enhance legal representation for low-income litigants in civil cases implicating basic human needs.¹²⁴ While the Shriver Act did not create rights or guarantee counsel, it established a structure under which legal agencies and actors could “partner to experiment with increased representation, innovations in court procedures, improved self-help, and other best practices to better serve indigent litigants.”¹²⁵ The program targeted six areas of law, including housing, domestic violence and restraining orders, elder abuse, guardianship of the person, probate conservatorship, and child custody.¹²⁶ The program has thus far funded over fifty attorneys and numerous affiliates, including paralegals, interpreters, and coordinators.¹²⁷ The Act allocated funding for the evaluation of these pilot programs.¹²⁸ Evaluation efforts will address efficiency, impact, and cost-benefit outcomes; in some cases, evaluation efforts will include experimental and comparative designs that examine the outcomes of particular legal assistance models in relation to control groups.

In August 2013, Illinois passed the Access to Justice Act, which creates several avenues for increasing legal assistance, including Civil Gideon pilots.¹²⁹ The bill identifies criteria for two pilot programs: “(i) a pilot program to create a statewide military personnel and veterans’ legal assistance hotline and coordinated network of legal support resources; and (ii) a pilot program to provide court-based legal assistance within a circuit court in each appellate district of the state.”¹³⁰ While the language of the Act is broad and does not specifically call for the expansion of representation, such efforts could easily fall under the bill’s mandate.¹³¹ This breadth has the capacity to provide interesting research opportunities. Richard Zorza suggests that some pilots could be “true Gideon pilots, with a right to counsel defined for a class of people, while others tested a triage system, and yet others one that gave discretionary appointment power to the judge.”¹³² Through this variation, these pilots could provide valuable empirical evidence on the mechanisms and outcomes produced through different legal assistance models. The bill outlines plans for evaluation and

123. Clare Pastore, *Gideon is My Co-Pilot: The Promise of Civil Right to Counsel Pilot Programs*, 17 UDC/DCSL L. REV. 75, 75 (2014) (citing Sargent Shriver Civil Counsel Act, CAL. GOV’T CODE § 68650 (West 2010)).

124. *Id.* at 100 (citing ADMIN. OFFICE OF THE COURTS, REPORT TO THE JUDICIAL COUNSEL FOR BUSINESS MEETING ON APRIL 29, 2011, Attachment A, <http://www.courts.ca.gov/documents/20110429itemp-revt.pdf>).

125. *Id.* at 91.

126. CAL. GOV’T CODE § 68651(b)(1) (West 2010).

127. Pastore, *supra* note 122, at 101.

128. *See id.* at 94–95.

129. H.R. 3111, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).

130. *Id.*

131. Richard Zorza, *Illinois Access to Justice Bill Has Several Interesting Aspects*, RICHARD ZORZA’S ACCESS TO JUSTICE BLOG (Aug. 21, 2013), <http://accesstojustice.net/2013/08/21/illinois-access-to-justice-bill-has-several-interesting-aspects/>.

132. *Id.*

specifies, “the report shall include the number of people served in each pilot program and data on the impact of varying levels of legal assistance on access to justice, the effect on fair and efficient court administration, and the impact on government programs and community resources.”¹³³

In 2013, the Maryland legislature signed into law an Act creating a Task Force to Study Implementing a Civil Right to Counsel in the Maryland.¹³⁴ The Task Force met regularly through 2013 and submitted a report in late 2014 detailing existing resources and recommendations for expanding representation in civil cases.¹³⁵ Their primary recommendations included: creating a right to counsel in civil domestic violence cases, establishing a pilot program providing counsel in child custody proceedings, and creating a workgroup to oversee implementation.¹³⁶ Though these recommendations have not yet been taken up by the legislature, the Task Force report made a compelling case for the expansion of civil legal representation in order to meet the needs of the state’s citizens.

At the local level, San Francisco amended the city Administrative code, establishing a desire to advance the right to counsel in civil matters.¹³⁷ As written in the ordinance, “the City and County of San Francisco hereby declares itself the first ‘Right to Civil Counsel City’ in the United States.”¹³⁸ The ordinance outlined the City’s ultimate goal of providing counsel in all proceedings with basic human needs at stake.¹³⁹ The ordinance further outlined the creation of a pilot program that would be funded and administered by the city.¹⁴⁰ The Justice and Diversity Center of the Bar Association of San Francisco administered this pilot program from October 2012 through September of 2013.¹⁴¹ A recently published evaluation documenting the program’s effects in relation to eviction proceedings indicates that representation—particularly full-scope representation—increased the likelihood that a tenant would be able to stay in their home.¹⁴² Over the course of the year, JDC provided full-scope representation in 117 cases and limited-scope representation in 692 cases.¹⁴³

133. Ill. H.R. 3111.

134. H.R. 129, 2013 Gen. Assemb., Reg. Sess. (Md. 2013).

135. Letter from Robert R. Neall, Chair, Task Force to Study Implementing a Civil Right to Counsel in Maryland, to Martin O’Malley, Governor, Maryland (Oct. 1, 2014), <http://www.mdcourts.gov/mdatjc/taskforcecivilcounsel/pdfs/finalreport201410.pdf>.

136. ROBERT R. NEALL, REPORT OF THE TASK FORCE TO STUDY IMPLEMENTING A CIVIL RIGHT TO COUNSEL IN MARYLAND 1 (2014).

137. S.F., CAL., ADMIN. CODE ch. 58 (2012).

138. *Id.*

139. *Id.*

140. *Id.*

141. JOHN & TERRY LEVIN CTR. FOR PUB. SERV. & PUB. INTEREST, STANFORD LAW SCH., SAN FRANCISCO RIGHT TO CIVIL COUNSEL PILOT PROGRAM DOCUMENTATION REPORT 2 (May 2014), <https://www.law.stanford.edu/sites/default/files/child-page/341183/doc/slspublic/SF%20RTCC%20Documentation%20Report.pdf>.

142. *Id.*

143. *Id.*

VI. THE EFFICACY OF LEGAL REPRESENTATION

Empirical research studying access to justice has focused primarily on analyzing the outcomes of civil cases in an effort to gauge the overall efficacy of representation in securing positive outcomes for low-income litigants.¹⁴⁴ These studies treat the presence of legal counsel as a variable that can causally affect the outcome of the case.¹⁴⁵ Though the findings are somewhat mixed, the majority of these studies have supported commonsense notions about the importance of representation in court.¹⁴⁶ In general, they find that being represented in court is positively correlated with winning cases.¹⁴⁷ Reviewing twelve studies that compared outcomes for represented and unrepresented litigants in civil cases, Rebecca L. Sandefur found that represented litigants were more likely to win than unrepresented litigants and that this relationship was strongest when the cases were complex.¹⁴⁸ Russell Engler offered a comprehensive review of research in housing, family, and consumer courts and found that generally representation helps people win and this help is most useful when there is a power imbalance between the parties involved.¹⁴⁹

The handful of random assignment outcome-based studies offer inconsistent findings regarding the efficacy of counsel in civil cases.¹⁵⁰ The earliest, two studies dating back to the late 1960s, examined juvenile justice delinquency proceedings in two jurisdictions and found no effect in one jurisdiction and only a modest effect in the other.¹⁵¹ Carroll Seron and others' 2001 study of New York City Housing Court found robust evidence that the provision of counsel produces large differences in outcomes, independent of the merits of the case.¹⁵² In this study, only 22% of represented tenants had final judgments entered against them, compared to 50% of tenants without representation.¹⁵³ D. James Greiner and Cassandra Wolos Pattanayak completed three studies utilizing randomized trials.¹⁵⁴ In the first study, they evaluated how offers of counsel

144. See, e.g., Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUS. 51 (2010) (discussing how lawyer representation changes the outcomes of adjudicated civil cases).

145. *Id.* at 61.

146. *Id.* at 69.

147. *Id.*

148. *Id.* at 73.

149. Engler, *supra* note 13, at 78–79.

150. Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L. & SOC'Y REV. 419, 419 (2001).

151. W. VAUGHAN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 66–68 (1972).

152. Seron, *supra* note 150, at 419.

153. *Id.*

154. See generally D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013) [hereinafter *Limits of Unbundled Legal Assistance*]; Greiner & Pattanayak, *supra*

affected outcomes for litigants in appeals of unemployment compensation decisions to state administrative law judges in one Boston court and found that offers of counsel had no effect on litigants' likelihood of prevailing in court.¹⁵⁵ In the second experimental study, involving summary eviction proceedings, they tested the effectiveness of an offer of full representation as compared to the provision of limited legal assistance, specifically in the form of a how-to session and assistance with completing legal documents.¹⁵⁶ Here, they found that an offer of full attorney representation mattered; litigants who were offered counsel were more likely than those who received limited legal assistance to retain possession of their unit (two-thirds versus one-third) and more likely to receive payments of rent waivers (9.4 months of rent per case versus 1.9 months).¹⁵⁷ In the third study, they found no significant difference in outcomes in housing court cases between those receiving full attorney representation and those receiving limited legal assistance (in the form of a lawyer-for-a-day program).¹⁵⁸ The growing "access to justice" scholarship empirically finds a largely positive relationship between representation and favorable outcomes for low-income litigants.¹⁵⁹

Because they study outcomes of civil litigation, but not the process, outcome-based, statistical models alone cannot provide the empirical base necessary for creating evidence-based policy and intervention. While they can retroactively tell us *whether or not* a legal aid intervention has affected case outcomes, they cannot tell us *how* that intervention did or did not make a difference. Those questions remain a "black box" in the model. As Seron and others correctly acknowledge about the randomized experiment they conducted: "[A] limitation of this study is that [it] cannot directly answer the question, What specifically did the lawyers do that produced these substantive results?"¹⁶⁰ Thus, *how* representation and legal aid make a difference is less understood.

VII. THE CIVIL *GIDEON* TAKE UP RATE

We do not know to what extent pro se litigants are accessing the free counsel that is provided by right in each state. Data from our own ongoing study

note 15; D. James Greiner et al., *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* (Sept. 1, 2012), <http://ssrn.com/abstract=1880078> [hereinafter *Randomized Experiment*].

155. Greiner & Pattanayak, *supra* note 15, at 2118. The blog Concurring Opinions hosted an online symposium about the study and contributors engaged in a robust and fruitful debate about the meaning and validity of the study's results. See Jeffrey Selbin, *Greiner and Pattanayak: The Sequel*, CONCURRING OPINIONS (Feb. 22, 2012), <http://concurringopinions.com/archives/category/representation-symposium>

156. *Limits of Unbundled Legal Assistance*, *supra* note 154, at 903.

157. *Id.*

158. *Randomized Experiment*, *supra* note 154, at 1.

159. Engler, *supra* note 13, at 78–79; Sandefur, *supra* note 144, at 69.

160. Seron et al., *supra* note 150, at 431.

examining access to justice in child support enforcement cases show that pro se defendants who are eligible for appointed counsel in civil contempt nonsupport proceedings rarely get counsel.¹⁶¹ Underutilization of existing rights to counsel raises questions regarding why eligible unrepresented parties are not in fact getting attorneys, and additional research is needed to assess the take up rate. Where findings demonstrate low take up rates, further research is needed to understand the contributing factors. Our research has uncovered several potential contributing factors, including: (1) lack of knowledge about and/or inaccessibility of appointed counsel; (2) subtle discouragement by judges and government lawyers; and (3) structural barriers that impede access to appointed counsel, including impersonal and demeaning bureaucratic processes and eligibility criteria that are set at extremely low income levels.¹⁶² Additionally, where research show high take up rates for Civil Gideon, comparative research can uncover what mechanisms can be employed to increase the take up rate.

A. The Costs of Civil Gideon to the Public

In debates about how best to address the civil justice gap, it is often taken for granted that the cost of providing counsel to economically needy pro se litigants will be prohibitive. This assumption may be in part due to the sheer magnitude of the civil justice gap and the projected costs of providing counsel to needy litigants. The Legal Services Corporation reports that fewer than one in five low-income persons get the legal assistance they need and that to meet this need the federal government would need to increase its civil legal services funding fivefold to \$1.6 billion.¹⁶³ A proportionate increase in funding would also be needed from IOLTA and the other state, local, and private sources that currently contribute to funding civil legal services. However, existing studies suggest that the provision of representation in civil cases can in fact provide both direct and indirect economic benefits that offset costs.¹⁶⁴ Additional data on the costs of funding Civil Gideon are needed. Studies examining the actual costs of Civil Gideon can be obtained from jurisdictions that currently provide appointed counsel in selected legal matters. For example, studies could explore the fiscal implications of providing legal representation to parents and children in TPR proceedings, which is a longstanding practice in most states. Such studies would reveal the actual economic cost of providing counsel and could assess whether provision of counsel produces benefits and savings elsewhere that offset those costs.¹⁶⁵

161. This empirical study is currently being conducted by the author and her research team.

162. *Id.*

163. LEGAL SERVS. CORP., *supra* note 1, at 3.

164. Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. FOR SOC. JUST. 139 (2010).

165. Relevant data is beginning to emerge. Some state entities have done state-specific studies examining the provision of civil legal aid and, in some of the studies, the findings address the

B. *The Costs of Civil Gideon to Litigants*

On the criminal law side, indigent defendants are often charged fees for appointed defense counsel.¹⁶⁶ In some instances the same practice takes place with respect to appointment of counsel in civil cases.¹⁶⁷ For example, Wisconsin provides for a right to counsel for obligors facing civil contempt in child support enforcement cases. However, state law also directs the public defender to impose a fee on litigants who are appointed counsel.¹⁶⁸ This raises the concern that poor people will accrue a large debt as a result of taking on “free” counsel. Additional research is needed to assess to what extent Civil Gideon is not truly free counsel.¹⁶⁹ Where fees are charged, more needs to be known about the extent of the fees, whether they discourage litigants from accessing counsel, and how those fees impact low-income civil litigants.

Additionally, charging poor litigants fees for accessing representation should be examined within the broader context of local governments’ and courts’ imposition of fees (and fines) on the public to recoup costs and generate revenue. Mounting evidence shows that such practices are widespread in some communities, involving myriad fees associated with legal processes and municipal services, and that the impact on poor residents can be economically and socially devastating.¹⁷⁰ Research is needed to understand the extent to which counsel fees associated with administering Civil Gideon contributes to this troubling phenomenon.

C. *The Administration of Civil Gideon*

Additional research is needed about the administration of Civil Gideon at the state level. The effectiveness of any Civil Gideon program can be undermined by weak implementation and/or administration, leaving low-income litigants with a “skim milk” form of representation. In our study, we observe several elements of

economic impact of Civil Gideon. *See State-Specific Studies and Reports*, NCCRC, <http://civilrighttocounsel.org/bibliography/sections/1796> (last visited Mar. 22, 2016). For example, one Illinois-based study concluded that “[e]ach dollar spent on selected legal aid providers was associated with \$1.80 in economic benefits for legal aid clients or other Illinoisans.” *See* SOC. IMPACT RES. CTR. FOR THE CHICAGO BAR FOUND. AND THE ILL. EQUAL JUSTICE FOUND., *LEGAL AID IN ILLINOIS: SELECTED SOCIAL AND ECONOMIC BENEFITS* 11 (July 17, 2012), <http://www.scribd.com/doc/94683773/Legal-Aid-in-Illinois-Selected-Social-and-Economic-Benefits>.

166. *See, e.g.*, WIS. STAT. ANN. § 977.075 (West 2008) (detailing indigent’s payment for legal representation).

167. *See, e.g., id.* § 767.83 (providing for a right to counsel in paternity actions); *id.* § 977.08(3)(g)(4) (directing public defender to impose a fee on litigants who are appointed counsel).

168. *See, e.g., id.* § 785.03.

169. *Id.* § 977.08(3)(g)(4).

170. Suzy Khimm, *Will the Government Stop Using the Poor as a Piggy Bank?*, MSNBC (Sept. 9, 2014), <http://www.msnbc.com/msnbc/will-the-government-stop-using-the-poor-piggy-bank>.

weak implementation that undermine the ability of appointed counsel to achieve justice for their clients, including: (1) low rates of compensation for appointed counsel; (2) appointment of attorneys who are inexperienced and/or lack expertise in the subject area of the case; (3) limitations on the timing of appointing counsel; and (4) limitations on the scope of representation.¹⁷¹

Civil counsel in appointed cases often receives low hourly rates pursuant to state law; however, more comprehensive data are needed on pay rates and their effect on quality representation. For example, in Wisconsin, attorneys who handle civil contempt proceedings in nonsupport cases are paid only \$40 per hour for their work.¹⁷² Though the figure is comparable to what Wisconsin pays assigned counsel in criminal cases, a recent Sixth Amendment Center report criticized the state for paying its appointed attorneys the lowest hourly rate in the nation, a rate so low that it questioned whether clients are receiving effective assistance of counsel in criminal matters.¹⁷³ Similarly, on the civil side, an unreasonably low rate of compensation with no allowances for an attorney's overhead expenses potentially creates conflicts of interest and interferes with counsel's ability to adequately represent their client.¹⁷⁴

Relatedly, additional research should study the qualifications of counsel who are being appointed to represent indigent parties in Civil Gideon jurisdictions. In our study, judicial respondents complained that many of the appointed counsel appearing before them in child support civil contempt cases were inexperienced recent law graduates and/or lacked adequate knowledge about the underlying substantive law.¹⁷⁵ The few experienced attorneys who handle these cases view them as largely pro bono because the low pay rate does not adequately compensate them for the time spent representing their clients. Our findings raise questions about whether administration of Civil Gideon is undermined by the failure to appoint competent counsel. Additional research is needed to understand the degree to which states address the fit between appointed attorneys' substantive expertise and the subject matter of the proceedings.

Finally, research should examine the effects of limitations on the timing of appointing counsel and on the scope of representation. It is common for the right to counsel to attach at the most dire stage of the proceeding. Similarly, in child support enforcement cases, jurisdictions that provide for appointed counsel do so when litigants are facing civil incarceration for nonpayment of support.¹⁷⁶ Appointed counsel is not available under state law earlier in the case, where delinquent nonpayers often have appeared unrepresented in numerous hearings

171. *See supra* note 161.

172. WIS. STAT. ANN. § 977.08(4)(c) (West 2008).

173. David Carroll, *Wisconsin's Low Attorney Compensation Rates Create Conflicts for the Indigent Accused*, SIXTH AMENDMENT CTR. (Apr. 30, 2015), <http://www.sixthamendment.org/wisconsins-low-attorney-compensation-rates-create-conflicts-for-the-indigent-accused/>.

174. *Id.*

175. *See supra* note 161.

176. *See, e.g.*, TEX. FAM. CODE ANN. § 157.163(b) (West 1995).

addressing their ability to pay court-ordered support.¹⁷⁷ Additional research is needed to assess whether counsel is being appointed early enough to make a difference in the cases they handle.

¹⁷⁷. *Id.*

APPENDIX I

Number of States with Laws Providing a Right to Counsel in Civil Cases
(NCCRC)

Subject Area	Categorical Right to Counsel	Discretionary Appointment of Counsel	Right or Appointment Is Qualified
Abuse/Neglect/Dependency—Accused Parents	42	5	3
Abuse/Neglect/Dependency—Children	28	8	13
Adult Protective Proceedings—Proposed Ward	16	2	1
All Basic Human Needs	0	15	8
Benefits—Claimant	0	0	6
Bypass of Parental Input into Abortion—Minor	30	3	5
CHINS Proceedings—Child	2	0	2
Civil Commitment—Subject of Petition	50	0	1
Civil Contempt—Defendant/Respondent	11	3	23
Civil Forfeiture	0	1	3
Custody Disputes—Parents	1	2	4
Custody Disputes—Children	1	25	4
Domestic Violence—Accused Person	1	1	3
Domestic Violence—Alleged Victim	1	4	6
Guardianship/Conservatorship of Adults— Proposed Ward	41	5	4
Health Care Access	0	0	0
Housing—Discrimination	0	7	0
Housing—Other	0	0	1
Immigration	0	0	2
Paternity—Defendant/Respondent	8	7	10
Paternity—Petitioner or Child	6	4	3
Quarantine/Sterilization/Inoculation	27	0	1
Sexually Dangerous/Violent Persons	20	0	1
Termination of Parental Rights (Private)— Birth Parents	26	3	7
Termination of Parental Rights (Private)—Children	4	3	8
Termination of Parental Rights (State)—Children	24	6	16
Termination of Parental Rights (State)—Parents	46	3	1

*